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No.

In the
Supreme Court of the United States

ROGER D. COWAN,

Petitioner,

v.

MARK WILKINSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, for purposes of exhaustion and default in a federal habeas action brought pursuant to 28 U.S.C. §2254, it is relevant that, during his or her state collateral attack on a conviction, a petitioner was not informed of his or her right to file a response/objection to appointed counsel's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987)?

2. Whether, when a state appellate court reviews the record as a foundation for granting appointed counsel's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), that court's review is a full merits review such that it preserves each and every issue raised in the trial court for purposes of a federal habeas corpus action brought pursuant to 28 U.S.C. §2254?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on November 1, 2000.

OPINION BELOW

The November 1, 2000, decision of the United States Court of Appeals for the Seventh Circuit is published at 231 F.3d 347 (7th Cir. 2000). A copy of this decision is included in the appendix to this petition. The January 3, 2001 order of the Seventh Circuit which denied Warden Cowan's Petition for Rehearing and Suggestion for Rehearing En Banc is reported at 2001 U.S.App. LEXIS 154 (7th Cir. January 3, 2001). A copy of this order is also included in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on November 1, 2000, and rehearing was denied on January 3, 2001. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The United States District Court for the Northern District of Illinois, Eastern Division, asserted jurisdiction under 28 U.S.C. § 2254. The United States Court of Appeals for the Seventh Circuit exercised jurisdiction under 28 U.S.C. §§ 1291 and 2253. Wilkinson had appealed from a final judgment of the District Court which denied his petition for a writ of habeas corpus by a person in state custody.

An Illinois jury convicted Wilkinson of first degree murder and concealment of a homicidal death. He was sentenced to consecutive terms of imprisonment of 70 years and 10 years, respectively, for those crimes. On direct appeal, the Illinois Appellate Court, First District, affirmed the convictions and the sentence for murder but reduced the 10-year sentence for concealment of a homicidal death to five years. *People v. Wilkinson* (unpublished order No. 1-92-4379, issued November 1, 1995). The Illinois Supreme Court denied Wilkinson's petition for leave to appeal on January 31, 1996.

On October 19, 1995, Wilkinson filed a petition for relief pursuant to the Illinois Post-Conviction Hearing Act (725 ILCS 5/122-1, et seq.). Wilkinson raised 17 issues in that petition, including an allegation that he was denied the effective assistance of counsel because trial counsel failed to adequately review the coroner's autopsy report of the victim and/or tender that report to Wilkinson. He alleged that the autopsy report contained errors which call into question the identity of the subject of the autopsy and validity of the coroner's finding regarding the cause of death. As permitted by the Illinois Post-Conviction Hearing Act, the trial court dismissed the

petition, without appointing counsel or holding a hearing, as being frivolous. On appeal from this summary dismissal, Wilkinson's appointed counsel filed a motion to withdraw as counsel and concomitant brief pursuant to this Court's opinion in *Pennsylvania v. Finley*, 481 U.S. 551 (1987). On February 26, 1997, the Illinois Appellate Court, First District, granted the motion to withdraw and affirmed the trial court judgment which had dismissed the post-conviction petition. *People v. Wilkinson* (unpublished order No. 1-95-4229, issued February 26, 1997). In his *pro se* petition for leave to appeal to the Illinois Supreme Court, Wilkinson presented, in summary fashion, the same issues which had been raised in the post-conviction petition. The Illinois Supreme Court denied Wilkinson's petition for leave to appeal on June 4, 1997.

On June 3, 1998, through counsel, Wilkinson filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Illinois. That habeas petition raised eight claims of constitutional error, several of which subdivided into multiple allegations. In his answer to the petition, Cowan alleged that those issues which had been presented in Wilkinson's post-conviction action were defaulted for federal habeas purposes because those claims had not been presented to the Illinois Appellate Court. On December 14, 1998, the district court denied Wilkinson's habeas petition. In doing so, the district court agreed that those issues presented only in the state post-conviction proceedings had been defaulted. The district court thereafter denied Wilkinson's application for a certificate of appealability.

The United States Court of Appeals for the Seventh Circuit granted a certificate of appealability on the sole issue of whether Wilkinson was denied the effective assistance of trial counsel due to counsel's failure to adequately investigate and disclose to Wilkinson the autopsy report. On appeal, again Cowan asserted that the ineffective assistance issue was defaulted. In support of this argument, Cowan noted that motion to withdraw filed by Wilkinson's appointed counsel had affirmatively stated that the post-conviction petition did not allege any facts which gave rise to a claim of a constitutional error and that, therefore, there were no appealable issues. Cowan also noted that Wilkinson had not filed any *pro se* pleading in opposition or response to appointed counsel's motion to withdraw. The Seventh Circuit found that the claim was not defaulted. As a basis for that holding, that court stressed that, in reaching its decision, the Illinois Appellate Court had stated that it had conducted a careful review of the record and had found no issues of arguable merit. The Seventh Circuit held that this language established that the state court had made a merits judgment on every issue presented in the post-conviction petition sufficient to preserve each of those issues for federal habeas review, although none of them had been specifically mentioned. The Seventh Circuit also stressed the fact that Wilkinson had, apparently, not been told of his right to respond to the motion to withdraw. The Seventh Circuit then remanded the case to the district court for a determination of the ineffective assistance claim.

Cowan filed a petition for rehearing with a suggestion for a rehearing en banc. The petition for rehearing was denied on January 3, 2001.

On remand, Cowan filed a motion to stay the proceedings pending a petition for writ of certiorari to this Court. The district court denied that motion. Cowan filed his supplemental answer, addressing the ineffective assistance claim, with the district court on February 23, 2001.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted Because The Seventh Circuit's Holding In This Habeas Case Conflicts With The Established Principles Of Law That A *Pro Se* Defendant Is Not Entitled To Special Treatment And That A Court's Review Of A Record For A Specific Limited Purpose Does Not Constitute, For Default Purposes, An Opinion On The Merits Of Issues Raised.

A person in custody pursuant to the judgment of a state court has the right to seek redress in a federal court through an application for a writ of habeas corpus alleging that he or she is in custody in violation of the Constitution, laws or treaties of the United States. *See* 28 U.S.C. §2254(a). However, federal habeas is not an ordinary error-correcting writ; rather, federal habeas is superimposed on the multi-layered and multi-faceted levels of criminal trial and appellate procedures and is an extraordinary remedy. *Verdin v. O'Leary*, 972 F.2d 1467, 1473 (7th Cir. 1992); *Nadworny v. Fair*, 872 F.2d 1093, 1096 (1st Cir. 1989) (citing *Braden v. 30th Judicial Circuit*, 410 U.S. 484, 490-91 (1973)). "The junction where federal habeas power intersects with state criminal processes is enswathed in a mutuality of respect between sovereigns." *Nadworny*, 872 F.2d at 1096. Therefore, under the prin-

ciple of comity, a federal court will not address an otherwise cognizable issue in habeas unless the state is first accorded the opportunity to protect the federally-assured interests of its criminal defendants. *Id.* (citing *Castille v. Peoples*, 489 U.S. 346 (1989), *Rose v. Lundy*, 455 U.S. 509, 518-20 (1982) and *Duckworth v. Serrano*, 451 U.S. 1, 4 (1981)). Indeed, "[i]t would be unseemly in our dual system of government for the federal courts to upset a state-court conviction without affording to the state courts the opportunity to correct a constitutional error." *Verdin*, 972 F.3d at 1473 (quoting *Duckworth v. Serrano*, 454 U.S. 1, 4). The Seventh Circuit has recognized that once a petitioner files a post-conviction proceeding, he is required to, at least, appeal the denial of those claims to the intermediate appellate court in order to avoid the effect of procedural default. *Cawley v. DeTella*, 71 F.3d 691, 695 (7th Cir. 1995); *Jenkins v. Gramley*, 8.F.3d 505 (7th Cir. 1993). Of course, this Court has recently made it clear that, in order to avoid procedural default, a habeas petitioner must first have also presented his issues to the highest state court if discretionary review to that court is available. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). Moreover, an issue is not exhausted when it has been presented for the first time in an application for discretionary review by a state's highest court. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). In sum, in order to properly exhaust his claims, and thus preserve them for federal habeas review, a petitioner must present his issue at each level of the state court system. *See Lines v. Larkins*, 208 F.3d 153, 159 (3rd Cir. 2000) (citing *O'Sullivan v. Boerckel*, 526 U.S. 838) (to be exhausted, issue must be presented at each level of appeal); *Doctor v. Walters* 96 F.3d 675, 678 (3rd Cir. 1996) (citing *Anderson*

v. Harless, 459 U.S. 4 (1982) and *Picard v. Connor*, 404 U.S. 270 (1971)) (to satisfy the exhaustion requirement petitioner must present his claim to each level of the state courts); *Wayne v. Missouri Board of Probation and Parole*, 83 F.3d 994, 998 (8th Cir. 1996) (claim exhausted after one full round of state litigation).

There is no doubt that Wilkinson did not present to the Illinois Appellate Court the ineffective assistance of counsel claim which was raised in his federal habeas petition. In fact, through counsel, Wilkinson affirmatively disavowed that claim. On appeal from the dismissal of Wilkinson's state post-conviction petition (which contained the ineffective assistance claim in question) appointed counsel filed a motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Counsel asserted that the petition failed to allege any facts which give rise to a claim of a constitutional deprivation and that, therefore, there were no appealable issues. Logically, it would seem that such an action would be at least as harmful to Wilkinson's subsequent attempts to raise the claim in federal habeas as the simple failure to present the claim to the state appellate court. Yet, the Seventh Circuit determined that the issue had not been defaulted. In support of this ruling, it apparently sought to excuse Wilkinson's failure to present the issue to the Illinois Appellate Court. The Seventh Circuit noted that Wilkinson had been served with a copy of the motion to withdraw but did not file a *pro se* response to the motion or a *pro se* merits brief. *Wilkinson v. Page*, 231 F.3d 347, 349, 351 (7th Cir. 2000). That court recognized that "[h]ad the appeal proceeded to briefing on the merits, Wilkinson (or his attorney) would have been obliged to develop the

basis for his ineffectiveness claim and thus to give the appellate court an adequate opportunity to evaluate the merits of that claim" and that "if Wilkinson had omitted to do so, he could be said to have defaulted on the claim." *Wilkinson*, 231 F.3d at 350-51. However, the Seventh Circuit went on to stress that Wilkinson had not been notified "that he had a *right* to respond to the motion, let alone an *obligation* to do so if he wished to preserve the claims for further review." *Id.* at 351. It found, therefore, that Wilkinson could not be faulted for not filing a *pro se* pleading and that he could not be charged with a procedural default under these circumstances. *Id.* at 351-52.

There are at least two flaws in this logic. First, it has often been held that a *pro se* defendant's lack of legal knowledge does not excuse a procedural default. *See, e.g., Freeman v. Page*, 208 F.3d 572, 575 (7th Cir. 2000) (imprisoned habeas petitioner was responsible for late filing of state post-conviction petition even though petitioner might not have known that time for filing the state action had recently been shortened); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (petitioner's lack of knowledge of one year time limitation for filing federal habeas action under 28 U.S.C. §2244(d) as amended did not warrant equitable tolling); *Hannah v. Conley*, 49 F.3d 1193, 1197 (6th Cir. 1995) (*pro se* status and lack of legal knowledge did not establish cause to excuse petitioner's failure to raise claims in state court); *Rodriguez v. Maynard*, 948 F.2d 684, 688 (10th Cir. 1991) (*pro se* petitioner's lack of awareness and training on legal issues did not establish cause for his failure to raise issue in an earlier petition); *Williams v. Arkansas*, 927 F.2d 409, 410 (8th Cir. 1991) (*pro se* status and educational background

do not establish sufficient cause for failing to raise issues in state court); *Whiddon v. Dugger*, 894 F.2d 1266, 1267 (11th Cir. 1990) (petitioner's non-lawyer status and alleged poor advice from an inmate law clerk did not excuse petitioner's state procedural default); *Hughes v. Idaho State Board*, 800 F.2d 905, 909 (9th Cir. 1986) (*pro se* petitioner's ignorance is not sufficient to satisfy cause under cause and prejudice test); *see also, People v. Haynes*, 174 Ill.2d 204, 673 N.E.2d 318, 339 (1996) (fact that defendant was acting *pro se* did not excuse failure to properly preserve issue for appeal); *People v. Long*, 39 Ill.2d 40, 233 N.E.2d 389, 391 (1968) (same). Second, as the Seventh Circuit recognized, this Court's opinion in *Pennsylvania v. Finley* itself indicated that such notice to a defendant is not constitutionally required. *Wilkinson*, at 351. In *Finley*, this Court allowed a procedure through which a defendant's state post-conviction appeal was dismissed after appointed counsel informed the appellate court that he found no meritorious issues and the appellate court, after an independent review of the record, agreed. *Finley*, 481 U.S. 551. There was no indication in *Finley* that the defendant had been notified of counsel's conclusion before the appellate court dismissed the appeal. *Id.* Moreover, this Court stressed that the defendant had gotten the independent review of the record by competent counsel required by state law and that the Constitution did not require more. *Id.* at 559. Thus, contrary to the Seventh Circuit's apparent assertion, the fact that Wilkinson may have been unaware of the law of procedural default for purposes of further state review, or for federal habeas review, does not excuse his failure to present his issues to the state appellate court when counsel found that he could not do so in good faith.

In support of its conclusion, the Seventh Circuit also found that the presentation of a motion to withdraw as counsel under *Finley*, in conjunction with the state appellate court's review of the record when it determined whether to grant the motion, resulted in a ruling on the merits by that appellate court, with regard to all of the issues raised in the state collateral action. *Wilkinson*, 231 F.3d at 351-52. The Seventh Circuit stressed that, when it granted counsel's motion to withdraw, the state appellate court stated that "[it had] carefully reviewed the record in this case and the aforesaid brief in compliance with *Pennsylvania v. Finley* and found no issues of arguable merit." *Id.* at 349, 351. The Seventh Circuit found that this phrase established that the appellate court had conducted a merits review of all of the issues raised in the post-conviction petition sufficient to meet the exhaustion requirement. *Id.* at 351. There is precedent which teaches that an issue can be regarded as exhausted when, although it was not specifically raised, a state appellate court nonetheless imparts a ruling on the issue. *Gentry v. Lunsdown*, 175 F.3d 1082, 1083 (8th Cir. 1999); *Walton v. Caspari*, 916 F.2d 1352, 1365 (8th Cir. 1990); *Sandstrom v. Butterworth*, 738 F.2d 1200, 1206 (11th Cir. 1984). However, other precedent teaches that the appellate court here should not be considered to have given full consideration to the merits of every possible issue, or even every issue raised in Appellant's state post-conviction petition.

First, the cases just cited above do not support the Seventh Circuit's finding. In *Gentry*, it was concluded that the petitioner's issues had not been considered on the merits when the state courts had denied his state

habeas petition without explanation. In *Sandstrom*, the federal court of appeals found that the state appellate court had addressed the merits of that petitioner's constitutional claim when the petitioner had presented the necessary facts and the state court had specifically cited to controlling precedent on the issue from the United States Supreme Court. *Sandstrom*, 738 F.3d at 1206. Likewise, in *Walton*, the court of appeals found that the state court had addressed the merits of an equal protection claim when the state court addressed the factual basis for that petitioner's claim using equal protection precedent. *Walton*, 916 F.2d 1356-57. Conversely, in the instant case, neither the facts which allegedly support Wilkinson's claim nor any precedent regarding the merits of the claims was specified by the state appellate court.

Further, the Seventh Circuit and other courts have found that similar limited examinations of a record do not constitute an analysis on the merits sufficient to meet the exhaustion requirement. In Illinois, an issue which has not been properly preserved for appeal may be addressed as "plain error" if the facts of the case are closely balanced or if the claim involves fundamental error which denied the defendant a fair trial. *People v. Herrett*, 137 Ill.2d 195, 561 N.E.2d 1, 7-8 (1990). In addressing the second prong of this exception, a state court first determines if error occurred and then determines if any error rose to the level of plain error. *Herrett*, 561 N.E.2d at 8. Obviously, in order to determine if the alleged error occurred, the court must address the merits of the defendant's claim. Nevertheless, the Seventh Circuit has held that such review does not preserve the issue for habeas review. *Neal v. Gramley*, 99 F.3d 841,

844 (7th Cir. 1996). This is true although the claim in question had been specifically designated.

In cases which more closely track the circumstances here, courts have found that a similar general review of the record does not amount to a review of the merits of any issue sufficient to preserve the issue for federal habeas consideration. For instance, although it no longer does so, it was the practice of the South Carolina Supreme Court, in all capital cases, to conduct a review in favorem vitae (in favor of life) in which the court reviewed the entire record for error regardless of whether the error had been objected to. *Smith v. Moore*, 137 F.3d 808, 821 (4th Cir. 1998); *Matthews v. Evatt*, 105 F.3d 907, 912-13 (4th Cir. 1997). The Fourth Circuit has repeatedly held that such review did not constitute a review on the merits which preserved an issue later raised in federal habeas. *Smith*, 137 F.3d at 821; *Matthews*, 105 F.3d at 912-13. Likewise, in *Coe v. Bell*, 161 F.3d 320, 336 (6th Cir. 1998), the court of appeals held that the fact that, pursuant to state statute, the Tennessee Supreme Court must review "significant errors," whether or not they were raised by a defendant, does not preserve such issues for habeas review. Likewise, a state statute requires the Arizona Supreme Court to review the record in capital cases for fundamental error. *Poland v. Stewart*, 117 F.3d 1094, 1105-06 (9th Cir. 1997). Again, the court of appeals rejected a petitioner's claim that such general review of the record preserved an issue for consideration in federal habeas review. *Id.* Likewise, a state statute requires the North Carolina Supreme Court to conduct an automatic review of a death sentence and to reverse the sentence if it finds that the record did not support the jury's findings

of aggravating circumstances, that the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, or that the sentence was excessive or disproportionate to the penalty imposed in similar cases. *Fisher v. Lee*, 215 F.3d 438, 456 (4th Cir. 2000). The court of appeals ruled that this statute did not mean that the state court had addressed the merits of that petitioner's attack on certain statutory aggravating factors. *Id.* Thus, the fact that an appellate court conducts a review of the entire record in search of error does not constitute a ruling on the merits of any particular unspecified error. Indeed, it appears that there are members of this Court who agree with this statement of law. *See McCaskle v. Vela*, 464 U.S. 1053 (1984), O'Connor, J., joined by Rehnquist, J. and Burger, C.J., dissenting from denial of *certiorari* (disagreeing with ruling of appellate court that unspecified claims of ineffective assistance of counsel were preserved by other allegations of ineffective assistance because state court reviewed the entire record to address the claims raised).

This conclusion is also supported by the law regarding *Finley* motions and motions to withdraw on direct appeal under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967). In support of its ruling, the Seventh Circuit cited to the analysis and explanation of *Anders* in *Penson v. Ohio*, 488 U.S. 75 (1988). *Wilkinson*, 231 F.3d at 351. First, it is not at all clear that the law of *Anders* is pertinent in the instant *Finley* situation. After all, the opinion in *Finley* itself rejects the application of *Anders* to collateral attack settings. *Finley*, 481 U.S. 551. Moreover, to the extent that the rule of *Anders* applies, the explanation of that case in *Penson* actually disproves the Seventh

Circuit's holding. In *Wilkinson*, the Seventh Circuit cited *Penson* for the proposition that when presented with a motion to withdraw as counsel, "once the appellate court decides that there is no non-frivolous issue for appeal, 'the court [may] proceed to consider the appeal *on the merits* without the assistance of counsel.'" *Wilkinson*, 231 F.3d at 351 (paraphrasing and quoting *Penson*, 488 U.S. at 80) (italics in *Wilkinson*) (underline added). In *Penson*, this Court also explained that if the appellate court "*concludes that there are nonfrivolous issues for appeal*, 'it must, *prior to decision*, afford the indigent the assistance of counsel to argue the appeal.'" *Penson*, 488 U.S. at 80 (paraphrasing and quoting *Anders*, 386 U.S. at 744) (emphasis added). An earlier case from this Court likewise stated that if a reviewing court concludes that there are non-frivolous issues to be raised, the court must appoint counsel to pursue the appeal and direct counsel to prepare an advocate's brief before the court decides the merits. *McCoy v. Court of Appeals of Wisconsin, District 1*, 486 U.S. 429, 444 (1988). As this language clearly sets forth, the appellate court's analysis of whether there are any non-frivolous issues is a limited inquiry, is separate from, and comes before an appellate court actually considers the merits of any issue. This is true since, according to *Penson* and *McCoy*, the court is only allowed to consider the merits of an issue, whether with or without counsel, after it has made a frivolity determination. Moreover, in the latter case, if the court had already considered the merits of an issue, there would be no need to appoint counsel to argue the issue.

This conclusion is further supported by other language in *McCoy* and by a case on which this Court relied in

McCoy. In *McCoy*, this Court stated that to categorize an argument as "wholly frivolous" is the same as saying that the argument is "without merit," which is the same as saying that an appeal lacks any basis in law or in fact. *McCoy*, 486 U.S. at 439, n.10. In *McCoy*, this Court relied a great deal upon its earlier decision in *Ellis v. United States*, 356 U.S. 674 (1958). *Id.* at 437. *Ellis* dealt with the question of when the court of appeals should grant a petition for leave to appeal *in forma pauperis*. This Court noted that, under the appropriate statutory "good-faith" standard, the request of an indigent for leave to appeal *in forma pauperis* should be granted unless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant. *Ellis*, 356 U.S. at 675. In doing so, this Court noted that "[t]he good-faith test must not be converted into a requirement of a preliminary showing of any particular degree of merit." *Id.* at 674-75. In sum, a determination of whether an issue is frivolous is a very limited initial finding which cannot be regarded as a reasoned analysis of an issue on the merits. Thus, the Seventh Circuit's reliance on *Penson* was misplaced. In actuality, that case, and other precedent from this Court, support an opposite result.

In addition, the Seventh Circuit's logic creates the ironic situation that counsel who files a motion to withdraw as counsel under *Finley* will preserve more issues than counsel who files a brief but raises less than all of the issues raised in the collateral action. This provides an interesting conundrum for counsel appointed on appeal in state collateral actions. As noted above, the Seventh Circuit found that a *Finley* motion preserves, for habeas review, any and all issues raised in the state trial court

in the collateral action. *Wilkinson,* at 351. Thus, that Court found that when counsel says that there are no issues upon which to base an appeal, all of the issues raised below are preserved. On the other hand, were counsel to raise in the state appellate court only one or two of several issues contained in the trial court pleading, there is no question that only those one or two claims would be preserved. In short, counsel must either raise on appeal all of the issues presented in a petitioner's state collateral action or risk being less effective, for habeas purposes, than counsel who chooses to raise no issues on appeal. Thus, under this less is more logic, appellate counsel in a state collateral action seeking to zealously represent his client must either raise all or none of the claims raised below. This, of course, appears contrary to the well recognized law that counsel on appeal be allowed to concentrate on certain issues in order to more effectively present those claims. "'Experienced advocates from time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.'" *People v. Tenner*, 175 Ill.2d 372, 677 N.E.2d 859, 867 (1997) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). According to the Seventh Circuit, counsel must now choose whether to represent a defendant more effectively by winnowing the wheat from the chaff in the state appellate court or by preserving all issues for federal review.

The Seventh Circuit's opinion is also offensive to the appellate courts of the several states. State courts which conduct the proper limited frivolity analysis of a constitutional claim in a *Finley* situation may lose their comity-

based privilege to perform a full merits analysis of any issues which a defendant did not present to them, but which he or she later presents in federal habeas petition. A state court which wants its opportunity to address such claims will be forced to ignore the sworn statement of counsel and address completely the merits of *every* issue raised below.

In sum, the Seventh Circuit's ruling is flawed in several ways. First, it presumes that the laws of procedural default cannot be applied against a layman who has not been specifically advised of those laws. Next, the opinion wrongly concludes that a review of the record for a limited purpose should be regarded as an analysis of all issues on the merits. This is not true, generally, with regard to limited purpose reviews of records and, specifically, with regard to frivolity determinations in a setting of a motion to withdraw by appellate counsel. Also, it creates a situation in which appellate counsel who does less is, in some ways, actually more effective than counsel who does more. Finally, it forces state appellate courts to perform a full merits review of issues which were not submitted or briefed on appeal. In sum, the Seventh Circuit's opinion sets dangerous precedent in a very important area of federal habeas law. This Court's cases teach that the principles of default and the considerations of comity with which default is inextricably entwined are a major factor in federal habeas. The far-reaching implications of the Seventh Circuit's opinion on those concepts should be addressed by this Court.

CONCLUSION

For all the foregoing reasons, Petitioner, Roger D. Cowan, respectfully requests that this Court grant *certiorari* and reverse the opinion of the United States Court of Appeals for the Seventh Circuit which held that Mark Wilkinson had not defaulted his claim of the ineffective assistance of trial counsel.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-1220

MARK WILKINSON,

Petitioner-Appellant,

v.

ROGER D. COWAN, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 3430—**George W. Lindberg**, *Judge*.

ARGUED DECEMBER 7, 1999—DECIDED NOVEMBER 1, 2000

Before HARLINGTON WOOD, JR., RIPPLE, and ROVNER, *Circuit Judges*.

ROVNER, *Circuit Judge*. Convicted of murdering his estranged wife, Mark Wilkinson sought post-conviction relief in Illinois state court. Among other things, he argued that his trial counsel was ineffective for failing to investigate (or to provide him with a copy of) the coroner's autopsy report, which contained certain obvious discrepancies. After the circuit court summarily dismissed Wilkinson's petition, his appellate counsel sought leave to withdraw, asserting that his case presented no issue of arguable merit. The

Illinois appellate court, upon review of the record, agreed. It granted the motion to withdraw, and without further ado, affirmed the circuit court's judgment. When he later sought federal habeas relief, the district court determined that Wilkinson had procedurally defaulted the ineffectiveness claim by failing to present the claim to the Illinois appellate court. We disagree. The state appellate court, when it elected to affirm the circuit court's judgment outright, without inviting Wilkinson to brief his appeal pro se, implicitly reached the merits of all of the issues he had raised in his post-conviction petition. We therefore remand the ineffectiveness claim to the district court for consideration on the merits.

I.

Wilkinson, an airline pilot, was in the process of divorcing his wife Gilda in 1991. He claims that on May 26 of that year, after driving his daughter to their home in the Chicago suburb of Hoffman Estates, he and Gilda began to argue about the divorce settlement. The argument escalated and, according to Wilkinson, Gilda began to hit him, grabbed his wrist, and then bit into his little finger and refused to let go. In an effort to free himself, Wilkinson says, he fought back—he tripped her, pushed her nose, punched her in the face, and, ultimately, squeezed her neck. Although Wilkinson claims it was not his intent to kill Gilda, that is what he did: she died of strangulation.

It turns out that Wilkinson previously had talked about the possibility of killing Gilda with several of his friends, and he had even detailed a variety of murder scenarios on his computer. Realizing that the circumstances were incriminating, Wilkinson consulted the print-out of murder scenarios he had carried with him in his car and decided that he should cremate Gilda's body and claim that she was missing. He went so far as to wrap her body in plastic (con-

veniently, he had a roll of plastic in the trunk of his car) and to partially dismember the corpse (so that it would fit into a fireplace). He was interrupted when his fiancée, her suspicions aroused by a telephone call canceling their dinner date, came to the house and confronted him. Eventually, Wilkinson told her that he had killed Gilda. She took the Wilkinsons' daughter from the house and telephoned his parents.

Wilkinson later stole a plane from a suburban airport and flew it into a storm front, purportedly in the hope of ending his life. The plane remained airborne, however, which Wilkinson interpreted as a sign of divine intervention. He landed the plane intending, he says, to turn himself in, but took off again when he spotted a police car approaching. He flew to an airport near Kankakee, Illinois, where he spent the night. He was arrested there the following morning.

A central issue at Wilkinson's trial was whether he intended to kill Gilda. Among the evidence that the State relied upon to show that Wilkinson deliberately strangled her was the autopsy report, which indicated that Gilda's Adam's apple had been crushed. Wilkinson alleges that he asked his attorney to provide him with a copy of the report in advance of trial so that he could review the report himself, but his attorney failed to do so. When he examined the report after the trial, Wilkinson discovered several discrepancies. Among other things, the report indicated that the coroner had removed the gallbladder and sent it for toxicological examination, but Gilda's gallbladder, Wilkinson alleges, had been surgically removed fourteen months prior to her death. The report also indicated that the body was free of scars, although Gilda had obvious scars not only from the removal of her gallbladder but also from the Caesarian section that had been performed when she gave birth to her daughter. Neither these nor any of the other asserted discrepancies in the report were raised by Wilkinson's attorney at trial, however.

A jury convicted Wilkinson in 1992 of first degree murder and of concealing a homicide. After the jury opted not to impose the death penalty, the trial judge ordered him to serve consecutive prison terms of 70 years for the murder and 10 years (reduced on appeal to five years) for concealment. The appellate court affirmed his conviction and sentence (as modified) in 1995, and the following year the Illinois supreme court denied his petition for leave to appeal.

Meanwhile, Wilkinson filed a pro se petition for post-conviction relief in the circuit court. Among the many claims he included in that petition was the contention that he was deprived of his Sixth Amendment right to the effective assistance of an attorney when his trial counsel failed to tender a copy of the coroner's report for his review and failed to review and investigate the report more thoroughly. *See, e.g.*, R. 30-9 at C42, C79, C91-92, C97-98. One month after Wilkinson filed the petition, the trial judge dismissed it as frivolous in a one-sentence order. R. 30-10 at C348. Wilkinson filed a notice of appeal, and at his request, the public defender's office was appointed to represent him. Invoking *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990 (1987), the defender's office filed a two-page motion to withdraw from representation. R. 11, Ex. E. The ten-line "brief in support" included in the body of the motion asserted without elaboration that "[Wilkinson's] petition fails to allege any facts that give rise to a claim of a constitutional deprivation. Therefore, there are no appealable issues in this case." *Id.* at 2 (citations omitted). Wilkinson was served with a copy of the motion, but he was not invited to file a response and he did not do so of his own initiative. Eleven months later, the Illinois appellate court issued an order granting the motion, stating:

> We have carefully reviewed the record in this case and the aforesaid brief in compliance with the mandate of *Pennsylvania v. Finley* and find no issues of arguable merit. Therefore, the motion of the public defender for

leave to withdraw as counsel is allowed and the judgment of the circuit court is affirmed.

Affirmed.

R. 11, Ex. F. at 2. Wilkinson sought leave to appeal to the Illinois supreme court, reasserting each of the claims he had included in his post-conviction petition (*see* R. 11, Ex. G), but that court denied his petition. R. 11, Ex. H.

In 1998, Wilkinson filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. His petition, as amended, included the claim of ineffectiveness based on his trial attorney's failure to give Wilkinson a copy of the coroner's report and to appropriately investigate that report. R. 20 at 7-8. The State's answer to the petition asserted that Wilkinson had procedurally defaulted the ineffectiveness claim (among others) by failing to present that claim to the Illinois appellate court on appeal from the denial of his post-conviction petition. R. 10 at 9-10. The district court agreed and denied the petition in a brief minute order, without reaching the merits of the ineffectiveness claim. R. 21. After the district court declined Wilkinson's request for a certificate of appealability, he renewed his request in this court. *See* 28 U.S.C. § 2253(c); Fed. R. App. 22(b)(1). Upon examination of the record and the district court's order, a judge of this court granted Wilkinson's application for a certificate of appealability limited to the following issue: "Whether trial counsel was ineffective in failing to investigate thoroughly and permit petitioner to review the accuracy of the medical examiner's autopsy report."

II.

Consistent with the limited terms of the certificate of appealability that this court issued, the sole claim that Wilkinson pursues on appeal is the ineffectiveness claim. In

essence, he contends that his attorney should have discovered the errors in the coroner's report; alternatively, he asserts that he was familiar with his wife's medical history and would have discovered discrepancies in the report himself if only his attorney had provided him with a copy as he requested. Had these errors been exposed at trial, Wilkinson argues, they would have undermined the credibility of the coroner's report and weakened the State's case for the proposition that Wilkinson deliberately strangled his wife. No court has reached the merits of this argument in any of the summary orders issued to date. The State argues that we ought not to do so either, because Wilkinson procedurally defaulted the ineffectiveness claim by failing to present it to the Illinois Appellate Court. *See generally Picard v. Connor*, 404 U.S. 270, 275-76, 92 S. Ct. 509, 512 (1971); *Bocian v. Godinez*, 101 F.3d 465, 469 (7th Cir. 1996); *see also, e.g., Cawley v. DeTella*, 71 F.3d 691, 694-95 (7th Cir. 1995); *Jones v. Washington*, 15 F.3d 671, 675 (7th Cir.), *cert. denied*, 512 U.S. 1241, 114 S. Ct. 2753 (1994), *overruled on other grounds by Hogan v. McBride*, 74 F.3d 144, 147, *modified on reh'g*, 79 F.3d 578 (7th Cir. 1996); *Jenkins v. Gramley*, 8 F.3d 505, 507-08 (7th Cir. 1993); *Farrell v. Lane*, 939 F.2d 409, 411 (7th Cir.), *cert. denied*, 502 U.S. 944, 112 S. Ct. 387 (1991).

The ineffectiveness claim, the State notes, was not one of the claims that Wilkinson pursued on direct appeal to the Illinois Appellate Court. That claim, in fact, was first raised in the post-conviction petition that the circuit court summarily dismissed as frivolous. Although Wilkinson did appeal from that dismissal, his appointed counsel sought leave to withdraw without briefing the merits of any of the issues raised in the case. In the State's view, it was incumbent upon Wilkinson at that juncture either to submit a pro se memorandum responding to the motion to withdraw or to file his own brief addressing the merits of the issues he sought to appeal. Not having done so, Wilkinson never

presented the operative facts and legal principles governing his ineffectiveness claim to the Illinois appellate court, and he thereby forfeited the right to pursue that claim in federal court.

In view of the particular way in which the Illinois appellate court disposed of Wilkinson's post-conviction appeal, however, we do not believe that he procedurally defaulted the ineffectiveness claim. Wilkinson did take an appeal from the dismissal of his post-conviction petition, and to that extent he preserved each of the claims asserted in his post-conviction petition for consideration by the appellate court. Had the appeal proceeded to briefing on the merits, Wilkinson (or his attorney) of course would have been obliged to develop the basis for his ineffectiveness claim and thus to give the appellate court an adequate opportunity to evaluate the merits of that claim. If he had omitted to do so, he could be said to have defaulted the claim. *E.g.*, *Howard v. O'Sullivan*, 185 F.3d 721, 725 (7th Cir. 1999); *Momient-El v. DeTella*, 118 F.3d 535, 540-41 (7th Cir.), *cert. denied*, 522 U.S. 984, 118 S. Ct. 448 (1997). Instead, however, the public defender's office, which had been appointed to pursue the appeal on his behalf, sought leave to withdraw, arguing without elaboration in its motion and supporting "brief" that the case presented no constitutional issue worthy of appellate review. Nominally, all that the defender's office asked for was to be released from its obligation to represent Wilkinson; it did not request the court to dismiss the appeal or to affirm the circuit court's judgment. But of course, any motion to withdraw pursuant to *Finley* or *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), necessarily implicates the merits of an appeal, because the premise of the motion is that the appeal is frivolous. In deciding whether to allow the withdrawal, the court must, therefore, examine the substance of the case to determine whether there are any issues of arguable merit. Once the court has satisfied itself that there are no such issues, the court may not only

release the appellant's counsel, but proceed to dismiss the appeal or to affirm the judgment. *See Anders*, 386 U.S. at 744, 87 S. Ct. at 1400. The apparent practice in Illinois is to affirm the judgment. *See, e.g., People v. Jones*, 231 N.E.2d 390 (Ill. 1967) (direct appeal, applying *Anders*); *People v. Lee*, 621 N.E.2d 287 (Ill. App. 1993) (post-conviction appeal, applying *Finley*). That is precisely what the appellate court did in this case. Its affirmance was based on something less than full, adversarial briefing—really, no briefing at all—but its order leaves no doubt that, after a "careful[ ] review[ ] [of] the record," the court affirmed outright the dismissal of Wilkinson's post-conviction petition. R. 11, Ex. F. at 2. This can only be understood as a merits-based decision with respect to each of the claims raised in the petition, including the ineffectiveness claim. *See Penson v. Ohio*, 488 U.S. 75, 80, 109 S. Ct. 346, 350 (1988) (once the appellate court decides that there is no non-frivolous issue for appeal, "the court [may] proceed to consider the appeal *on the merits* without the assistance of counsel") (emphasis ours).

It may have been possible, as the State suggests it was, for Wilkinson on his own initiative to have argued the merits of his ineffectiveness claim either by filing a memorandum in opposition to the public defender's motion to withdraw (and citing his ineffectiveness claim as one that merited appellate review in the normal course) or by filing a merits brief of his own; but we do not think that Wilkinson can be faulted for failing to take either of these steps. Wilkinson was not apprised (either by his attorney or by the appellate court) that he had a *right* to respond to the motion, let alone an *obligation* to do so if he wished to preserve his claims for further review. *Cf. Lee*, 621 N.E.2d at 65 (post-conviction appeal) ("Counsel requested that this court grant petitioner a reasonable opportunity to show cause why the appeal should not be dismissed or the judgment affirmed for lack of merit and why the office of the State Appellate Defender should not be allowed to with-

draw as counsel on appeal. The clerk of this court advised petitioner that he had 30 days in which to respond to the motion and in which he could file any additional matters of merit."); *People v. Hopkins*, 354 N.E.2d 141, 142 (Ill. App. 1976) (post-conviction appeal) ("Copies of the motion [to withdraw] and brief were forwarded to the defendant, and he was advised that he might file any points in support of his position."). We do not mean to fault either the appellate court or Wilkinson's attorney for not taking that step; *Finley* itself indicates that such prophylactic measures are not constitutionally required in the post-conviction setting. We simply reject the State's contention that Wilkinson can be charged with a procedural default under these circumstances.

When it chose to affirm outright the dismissal of Wilkinson's post-conviction petition, the appellate court rendered a merits judgment as to each of the claims raised in that petition. The fact that the court did not identify or discuss the ineffectiveness claim in its order is irrelevant. *Smith v. Digmon*, 434 U.S. 332, 98 S. Ct. 597 (1978) (per curiam). What matters is that Wilkinson made the claim in his post-conviction petition, that the appellate court undertook a "careful review" of the record on its own without soliciting merits briefing from Wilkinson, and affirmed the dismissal of his petition. Notably, the court did not rely on any omission by Wilkinson as an independent procedural ground for affirmance; it chose instead to affirm the dismissal of Wilkinson's petition outright. Accordingly, the federal courts have jurisdiction over Wilkinson's ineffectiveness claim. *See generally Harris v. Reed*, 489 U.S. 255, 109 S. Ct. 1038 (1989); *see also, e.g., Hunter v. Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992), *cert. denied*, 510 U.S. 887, 114 S. Ct. 240 (1993); *Lewis v. Borg*, 879 F.2d 697, 698 (9th Cir. 1989) (per curiam); *cf. Coleman v. Thompson*, 501 U.S. 722, 740, 111 S. Ct. 2546, 2559 (1991) (procedural default found where state supreme court granted State's motion to dismiss

petition to appeal as untimely, as opposed to denying petition).[1]

At this juncture, we believe it appropriate to return the case to the district court to give that court the first opportunity to consider the merits of Wilkinson's ineffectiveness claim. None of the four courts to which this claim has been presented previously has explicitly addressed this claim. Wilkinson is entitled to have the claim considered, and our own evaluation of the claim on appeal would be greatly facilitated if we had some rationale to review.

III.

Having found that Wilkinson did not procedurally default his claim of attorney ineffectiveness, we REVERSE the judgment in part and REMAND the case to the district court so that it may address the merits of that claim.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

---

[1] Wilkinson has independently argued that the Illinois appellate court deprived him of due process by affirming the circuit court's judgment without first granting him the opportunity to retain new representation or allowing him to file his own brief, once the court had decided to allow the public defender to withdraw. That argument was not presented below, however, notwithstanding the fact that the issue was evident from the face of the appellate court's order. Typically, we do not reach the merits of arguments raised for the first time on appeal, *e.g.*, *Perry v. Sullivan*, 207 F.3d 379, 383 (7th Cir. 2000), and we discern no special circumstances that would counsel in favor of us doing so here.

App. 11

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Mark Wilkinson — JUDGMENT IN A CIVIL CASE

v. — Case Number: 98 C 3430

Thomas Page

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☐ Decision by Court. This action came to trial or re-hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Mark Wilkinson's petition for writ of habeas corpus is denied. 28 USC Section 2254(e)(1).

Michael W. Dobbins, Clerk of Court

/s/ Sandra L. Brooks
Sandra L. Brooks, Deputy Clerk

Date: 12/16/1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT ILLINOIS

Michael W. Dobbins
CLERK

Office of the Clerk

Stephen F. Potts
Illinois Attorney General's Office
100 West Randolph Street
12th Floor
Chicago, IL 60601

Case Number: 1:98-cv-03430

Title: Wilkinson v. Page

Assigned Judge: Honorable George W. Lindberg

MINUTE ORDER of 12/14/98 by Hon. George W. Lindberg : Mark Wilkinson's amended petition for writ of habeas corpus is denied, as is the request for an evidentiary hearing. [20-1] The court has considered the submissions of the parties, and finds that claims A, B, part of C, D, G, and H were procedurally defaulted because they were not raised on the state court appeal of the denial of petitioner's post-conviction petition, and that the balance of claim C and claims E, and F were decided on factual determinations made by the Illinois Appellate Court, and petitioner has failed to rebut the presumption of correctness of those factual determination by clear and convincing evidence. 28 USC 2254(e)(1). terminating case Mailed notice

This docket entry was made by the Clerk on December 19, 1998

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

January 3, 2001

Before

Honorable HARLINGTON WOOD, JR., *Circuit Judge*
Honorable KENNETH F. RIPPLE, *Circuit Judge*
Honorable ILANA DIAMOND ROVNER, *Circuit Judge*

No. 99-1220

MARK WILKINSON,

Petitioner-Appellant,

v.

ROGER D. COWAN, Warden,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 3430—Hon. George W. Lindberg, *Judge*.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by petitioner-appellant on November 29, 2000 as corrected November 30, 2000, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS HEREBY ORDERED that the petition for rehearing with suggestion for rehearing en banc be, and the same is, hereby DENIED.

No. 00-1472

IN THE

Supreme Court of the United States

ROGER D. COWAN, Warden,

Petitioner,

v.

MARK WILKINSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The procedural default claimed in the instant habeas action is Wilkinson's failure to submit a pro se brief on the merits of his appeal after his appointed counsel filed a *Finley* motion that prayed only for leave to withdraw. The Illinois Appellate Court granted counsel's motion and in the same order affirmed the judgment against Wilkinson without notice to him that it might do so and without giving him the opportunity to file a merits brief. Does Wilkinson's failure to file a pro se merits brief constitute a procedural default?

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REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

The true issues in this case are not those set forth by the Petitioner, Roger D. Cowan, the warden of the state prison in which the Respondent, Mark Wilkinson, is being confined. The holding of the Seventh Circuit Court of Appeals was narrowly drawn: a representative of a state may not claim a procedural default in a federal habeas corpus proceeding when the state appellate court affirmed a judgment against a defendant without giving notice to that defendant that the court might do so and without giving the defendant an opportunity to be heard in regard to the possible affirmance. The issues that Cowan raises — whether, for exhaustion and default purposes, a postconviction petitioner-appellant must be informed of his right to file a response to his appointed counsel's *Finley* motion to withdraw and whether the state appellate court's review of the record in the *Finley* context is a full merits review such that it preserves all issues raised in the trial court for federal habeas purposes — are irrelevant to that holding.

The Public Defender of Cook County, Illinois, who had been appointed to represent Wilkinson for his appeal of the trial court's judgment dismissing his postconviction petition, filed a motion pursuant to *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990 (1987) praying only that she be allowed to withdraw as Wilkinson's counsel. A copy of that motion was served upon Wilkinson who did not file an objection to the Public Defender's withdrawal. Wilkinson was never served notice that any other motion or matter was pending before the court and there was no logical reason for him to believe that the appellate court would rule on anything other

than his attorney's prayer to withdraw. Certainly he had no reason to suspect that the appellate court might, *sua sponte*, consider that prayer an invitation to affirm the judgment of the trial court. That is, however, precisely what the appellate court did; it ruled against Wilkinson on a matter that he never knew was before the court, the court's own unnoticed, unwritten, sub rosa motion to affirm the judgment of the trial court.

The appellate court, then, ruled upon two separate issues affecting Wilkinson when it had only been asked to rule on one. The court first granted Wilkinson's appointed counsel leave to withdraw and the court then proceeded to affirm the judgment of the trial court against Wilkinson. Certainly the Illinois courts consider these to be separate and distinct issues. *See* Illinois Supreme Court Rule 13(c)(2) and *In Re the Marriage of Miller*, 273 Ill. App. 3d 64, 652 N.E.2d 396, 399 (3d Dist. 1995) (wherein the court found "that the letter and spirit of Rule 13 require a 21-day transition period and that nothing prejudicing a client's rights should occur within the 21 days following the allowance of an attorney's withdrawal."). And the separateness of the two issues and Wilkinson's lack of notice that the second issue was under consideration by the court show clearly why the issues that Cowan raises in his certiorari petition are irrelevant here. Cowan has specifically set his issues within the confines of a *Finley* motion for leave to withdraw while the real issue, the one the Seventh Circuit Court of Appeals decided, revolved around what the Illinois Appellate Court did to Wilkinson after it granted his attorney leave to withdraw.

II.

MISSTATEMENTS OF FACT

The substantive issue before the Seventh Circuit was Wilkinson's claim of ineffective assistance of counsel. Cowan argues in his certiorari petition (Cert. Pet. 7) that Wilkinson did not present that claim to the Illinois Appellate Court in that he did not file a pro se response to the Public Defender's motion to withdraw or a pro se brief on the merits of his appeal. Wilkinson's failure to file a response to the withdrawal motion shows only that he did not object to the withdrawal of an appointed attorney who found no appealable issues in his case. It does not show that he intended to abandon his appeal. He may very well have relied upon Illinois Supreme Court Rule 13(c)(2) to enable him to file his appearance and a pro se merits brief or to retain substitute counsel after his appointed counsel had been granted leave to withdraw. So Cowan states the fact that Wilkinson did not file a pro se brief arguing the merits of his appeal but Cowan fails to apprise this Court of the fact that under Illinois law Wilkinson could not legally file such a brief.

A criminal defendant appellant in Illinois has the right to proceed by an attorney or pro se but that appellant cannot engage in a hybrid proceeding where he is both represented and pro se. *People v. Handy*, 278 Ill. App. 3d 829, 664 N.E.2d 1042 (4th Dist. 1996); *People v. Woods*, 292 Ill. App. 3d 172, 684 N.E.2d 1053 (4th Dist. 1997), *appeal denied*, 175 Ill. 2d 553, 689 N.E.2d 1146. Indeed, in *Woods*, the appellate court, on its own motion, struck a pro se brief filed by an appellant who was represented by counsel.

In other words, Wilkinson could not file a pro se appellate brief while he was represented by counsel and he was represented by counsel right up to the moment that the

appellate court entered its order granting the Public Defender's motion to withdraw. But then, at the very moment that the appellate court rendered Wilkinson pro se, which would have enabled him to legally file a pro se brief, the appellate court, in the same order, took away any possibility that Wilkinson could actually submit a pro se brief when the court terminated his appeal by affirming the judgment of the trial court. When Cowan, then, argues that Wilkinson had to file a pro se merits brief to avoid procedural default, he omits the fact that, under Illinois law, Wilkinson could not do the very thing that Cowan disingenuously insists Wilkinson had to do.

An additional misstatement of fact is contained in the opinion of the Seventh Circuit appended to the petition for certiorari. The opinion states that "[a]lthough Wilkinson claims it was not his intent to kill (his wife), that is what he did: she died of strangulation." *Wilkinson v. Cowan*, 231 F.3d 347, 348 (7th Cir. 2000). The cardinal element of Wilkinson's ineffective assistance claim is that the autopsy upon which the state relied to prove a criminal cause of death contained errors of sufficient number and importance to raise the reasonable inference that the autopsy was upon a decedent other than Wilkinson's wife or that the county medical examiner contrived or fabricated the autopsy in whole or part other than conclusions that were obvious from post mortem photographs of the exterior of the body. Given that inference, then, the autopsy and the testimony of the medical examiner based upon it would be invalid as evidence of any cause of death, much less a criminal one. The Court implicitly recognized the significance of the autopsy, *Wilkinson*, *supra* at 349, but then stated that Wilkinson strangled his wife as though it were a proven fact.

In fact, absent an autopsy that is known to a legitimate degree of certainty to be of Gilda Wilkinson, the only

evidence of strangulation was Wilkinson's testimony about the fight with his wife on the night she died. The fight is described in the Seventh Circuit's opinion:

> The argument escalated and, according to Wilkinson, Gilda began to hit him, grabbed his wrist, and then bit into his little finger and refused to let go. In an effort to free himself, Wilkinson says, he fought back — he tripped her, pushed her nose, punched her in the face, and, ultimately, squeezed her neck.

Wilkinson, *supra* at 348. Of course, that scenario *could* indicate a cause of death of strangulation. It is, however, at least as likely, absent a valid autopsy to prove otherwise, that Wilkinson's wife died when, in her attempt to chew off Wilkinson's finger — and she had chewed through his flesh and into the bone — a minute piece of his tissue, a small fragment of bone, tendon, muscle or skin from his finger, either obstructed her larynx or made contact with her vocal chords, thereby inducing acute cardiac arrest. *See* Cyril J. Polson, D. J. Gee and Bernard Knight, *The Essentials of Forensic Medicine*, 4th ed. (Oxford: Pergamon Press, 1985), pp. 351 and 355, discussed in greater detail, with additional forensic medicine authorities, in Wilkinson's brief, pp. 27-29, before the Seventh Circuit Court of Appeals. In fact, Polson, et al., at 355, cite one study in which slightly more than 50% of deaths arising from constriction of the neck were actually due to cardiac arrest. Absent a valid autopsy, then, no cause of death can be stated as fact and certainly, with all deference due to the Seventh Circuit, strangulation cannot be stated as a fact.

The Seventh Circuit is also in error when it states that Wilkinson raised and argued a due process issue that had not been presented in the district court. *Wilkinson*, *supra* at

352, n.1. In fact, the claim of denial of due process was raised in the district court as a sub-issue of the greater issue of procedural default — but, whether as a free-standing issue or as a sub-issue, due process was raised in the district court and discussed in the memoranda that both parties submitted to that court.

The certiorari petition and the Seventh Circuit's opinion appended thereto contain other misstatements of fact but those misstatements appear to be irrelevant to the issue of whether certiorari should be granted or denied. Wilkinson would like to reserve the right to call those misstatements to the Court's attention in the event that certiorari is granted and Cowan then raises issues which would cause those misstatements to become relevant.

III.

ARGUMENT

Cowan, in his certiorari petition, presents two questions for review and then, in support of those questions, argues five reasons as justification for the issuance of a writ of certiorari.

A. COWAN CONTENDS THAT WILKINSON DID NOT PRESENT HIS INEFFECTIVE ASSISTANCE CLAIM TO THE ILLINOIS APPELLATE COURT

Cowan submits that to avoid a procedural default Wilkinson had to have presented his ineffectiveness claim at each level of the state court system. Cowan then contends that Wilkinson failed to present to the Illinois Appellate Court when he did not file, upon being served with his attorney's *Finley* motion, a pro se response to that motion or a pro se brief arguing the substance and merits of his appeal.

As this Court determined in *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S. Ct. 1715 (1992), just as the state courts must afford a petitioner a full and fair hearing on his federal claim, so must that petitioner afford the state courts a full and fair opportunity to address and correct any constitutional errors committed by the state courts in the petitioner's state court case. The state courts need not actually rule on the merits of the federal claim as long as they had the opportunity to rule on the same question raised in the federal habeas petition. *Arrowood v. Clusen*, 732 F.2d 1364 (7th Cir. 1984); *Parker v. Parratt*, 662 F.2d 479 (8th Cir. 1981), *cert. denied*, 459 U.S. 846, 103 S. Ct. 102 (1982). The state courts have had the opportunity to rule on a petitioner's federal claim when the substantial equivalent or the substance of the federal habeas claim has been presented to them. *Picard v. Connor*, 404 U.S. 270, 92 S. Ct. 509 (1971); *Toney v. Franzen*, 687 F.2d 1016 (7th Cir. 1982). And the substantial equivalent or the substance of the federal claim has been presented when the petitioner has submitted both the operative facts and the controlling legal principles to the state courts. *Picard, supra*; *Verdin v. O'Leary*, 972 F.2d 1467 (7th Cir. 1992). More specifically, in order to offer the state courts a fair opportunity to consider a federal claim, a petitioner's submission to the state courts must: (1) rely on pertinent federal cases employing constitutional analysis; or (2) rely on state cases applying federal constitutional analysis to a similar factual situation; or (3) assert the claim in terms so particular as to call to mind a specific federal constitutional right; or (4) allege a pattern of facts that is well within the mainstream of federal constitutional litigation. *Verdin, supra* at 1473-74. Thus can the state courts be alerted to the federal issue and offered a fair opportunity to rule upon the federal claim. Here Cowan never contended in either the federal district or circuit courts that the state courts had not had a full and fair opportunity to rule on Wilkinson's ineffective assistance claim or that Wilkinson hadn't presented the

operative facts and controlling legal principles to the state courts. (E.g., Wilkinson's postconviction petition, which was before both the Illinois trial and appellate courts, may itself have satisfied the third or fourth *Verdin* criteria.) Instead, Cowan contended only that Wilkinson did not argue the substance of the federal habeas claim in a pro se brief to the state appellate court.

More significantly, Cowan does contend that Wilkinson's failure to file pro se objections to his attorney's *Finley* motion or a pro se brief arguing the merits of his appeal in and of themselves constitute a procedural default. Those contentions, however, are without merit. As discussed supra, Wilkinson's failure to file a response to his attorney's withdrawal motion indicates only that he did not object to said attorney's withdrawal and his failure to file a pro se brief signifies solely that he could not legally file a pro se brief before his attorney had been granted leave to withdraw and he could not file a pro se brief after his attorney had been granted leave to withdraw because the appellate court had terminated his appeal when it affirmed the lower court's judgment in the same order in which it granted his attorney leave to withdraw.

Certainly, Wilkinson had no reason to believe, no notice, no indication whatsoever, that the Illinois Appellate Court contemplated anything other than allowing the Public Defender to withdraw as his appointed counsel. Just as certainly, he should have been able to rely upon the appellate court's compliance with Illinois Supreme Court Rule 13(c)(2). Cowan seeks to direct this Court's attention away from the foregoing points by attempting, in his statement of questions presented for review and in his argument of those questions, to fix everything in the context of the Public Defender's *Finley* motion: (1) is it relevant for federal habeas corpus default purposes that a defendant collaterally

attacking his state court conviction was not informed of his right to file a response to appointed counsel's motion to withdraw? and (2) is a state appellate court's review of the record for the purpose of ruling upon appointed counsel's motion to withdraw a full merits review that preserves all issues raised in the state trial court? Wilkinson, though, did not and does not object to the Public Defender being allowed to withdraw as his attorney. He did and does, however, strenuously object to what the appellate court did after it allowed the Public Defender to withdraw. The court affirmed the judgment against him without notice to him that it might do so and thus deprived him of any opportunity to be heard on the merits of his appeal and, contrary to Cowan's implication, a response to appointed counsel's motion for leave to withdraw is simply not the same as a full merits brief arguing the substantive issues in one's appeal.

Surely a court of law contemplating, apparently sua sponte, such drastic action against a party should have to notify that party of the court's contemplations so that the party might have an opportunity to dissuade the court. Notice and the opportunity to be heard are, after all, at the very foundation of our legal system. As this Court stated in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656-7 (1950),

> [m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and the opportunity for hearing appropriate to the nature of the case.

When an adjudication might be harmful to an individual's substantial interests, notice and hearing must measure up to

the standards of due process. *Mullane*, *supra*; *United States v. Cupples*, 112 F.3d 318 (8th Cir. 1997). As this Court also said in *Mullane*, notice must afford a reasonable time for an interested party to present his objections to the proposed action and the right to present objections, the right to be heard, has little, if any, worth unless that party is informed that the matter is pending so that he can timely choose whether to acquiesce or contest. *Mullane*, 339 U.S. at 314, 70 S. Ct. at 657.

Wilkinson was given notice of his attorney's *Finley* motion but he was never given notice that the appellate court might decide his appeal against him at the same time that it ruled on that motion. Cowan, however, contends that notice to Wilkinson that the judgment against him might be affirmed when the appellate court ruled on his lawyer's *Finley* motion was not required because "[t]here was no indication in *Finley* that the defendant had been notified of counsel's conclusion (that he found no meritorious issues in the case) before the appellate [sic] court dismissed the appeal [sic]." (Cert. Pet. 9.) Once again, Cowan confuses the issue here. The petitioner in *Finley* may not have been given notice of her attorney's efforts to withdraw as her counsel (*see*, *e.g.*, *Finley*, 481 U.S. at 566, 107 S. Ct. at 1999, Brennan dissenting) but there is no indication anywhere in *Finley* that she was not given notice that the court, on its own motion or on any other basis, might dismiss her postconviction petition.

Finally, regarding presentment of the ineffective assistance claim, Cowan argues that Wilkinson affirmatively disavowed the claim through the Public Defender's statement in her motion to withdraw that the postconviction petition "failed to allege any facts which give rise to a claim of constitutional deprivation . . ." (Cert. Pet. 7.) The Public Defender was, of course, officially Wilkinson's legal representative until the appellate court granted her leave to

withdraw but once the Public Defender filed her *Finley* motion she effectively ceased being Wilkinson's advocate. Her advocacy from that point on was directed toward furthering her own interest of being let out of the case and that interest could only be advanced by arguing against her client's interest of having his appeal briefed and argued on the merits. *See Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 2555 (1975) cited in *Finley*, *supra*, 481 U.S. at 569, 107 S. Ct. at 2000 (Brennan dissenting). It is well settled that a client is entitled to counsel whose undivided loyalties lie with that client and that an actual conflict of interest arises between a client and his attorney once that attorney has made a choice to advance his own interests to the detriment of his client's interests. *Stoia v. United States*, 109 F.3d 392 (7th Cir. 1997); *Gray-Bey v. United States*, 156 F.3d 733 (7th Cir. 1998).

Certainly, Cowan cites no authority for the proposition that a client is bound by statements made by his attorney in furtherance of that attorney's interests in a *Finley* motion. And *Finley* itself indicates the opposite. If Finley had indeed been bound by her lawyer's representation to the court that her case contained no arguable issues, her case would have ended there. Instead, however, this Court determined that a court presented with a *Finley* motion must independently review the record to assure itself that the attorney's assertions are correct.

B. COWAN CONTENDS THAT A PRO SE DEFENDANT'S LACK OF LEGAL KNOWLEDGE DOES NOT EXCUSE A PROCEDURAL DEFAULT

Cowan cites numerous cases in his attempt to support this contention but neither the contention itself nor the citations are relevant to the Seventh Circuit's ruling.

Initially, Cowan's contention assumes a major premise that is not true. Wilkinson's failure to file a pro se brief arguing the merits of his appeal was not due to a lack of legal knowledge on his part but was, rather, due to the Illinois Appellate Court's failure to comply with the United States Constitution and the laws of the State of Illinois. It was the appellate court, after all, that violated constitutional requirements of due process when it refused to send Wilkinson any notice at all that upon its own unwritten, sub rosa motion it intended to affirm the lower court's judgment against him. It was the appellate court that violated the rules of its own supreme court when it granted Wilkinson's attorney leave to withdraw and then refused to grant Wilkinson the required minimum of 21 days to retain substitute counsel or to file his own appearance and proceed pro se. It was the appellate court that deprived Wilkinson of his opportunity to be heard on the merits of his appeal when, knowing full well that under Illinois law he could not file a pro se brief while he was represented by counsel and also knowing that the Public Defender had effectively ceased to be his advocate when she filed her *Finley* motion, the court granted the Public Defender leave to withdraw, which would have enabled Wilkinson to proceed pro se, but then instantaneously took away his opportunity to proceed at all when it terminated his appeal in the same order. It wasn't, then, Wilkinson's lack of legal knowledge that prevented him from filing a pro se appellate brief. He did everything that the appellate court did not keep him from doing to advance the claims specified in his postconviction petition. It was, instead, the appellate court's multiple violations of federal and state law that prevented Wilkinson from filing a merits brief. And now Cowan prays this Court to sanction those violations of law by granting certiorari and then proclaiming that the illegal is now legal and Wilkinson should indeed be found in procedural default for not filing a brief when, in fact, the Illinois Appellate Court prevented him from filing one.

C. COWAN CONTENDS THAT AN APPELLATE COURT'S REVIEW OF THE RECORD FOR THE SPECIFIC LIMITED PURPOSE OF CONSIDERING COUNSEL'S MOTION TO WITHDRAW IS NOT A FULL MERITS REVIEW THAT PRESERVES EACH ISSUE RAISED IN THE TRIAL COURT FOR FEDERAL HABEAS CORPUS PURPOSES

The obvious response to this contention is that the Illinois Appellate Court's review of the record was not for the sole purpose of determining the *Finley* motion. The review of the record was also for the purpose of disposing of the appeal itself, if necessary, after the court disposed of counsel's motion to withdraw. The Seventh Circuit recognized as much when it stated that "[t]he state appellate court, *when it elected to affirm the circuit court's judgment outright*, . . . implicitly reached the merits of all issues (Wilkinson) had raised in his post-conviction petition." *Wilkinson*, *supra* at 348; emphasis added. It was certainly clear to the Seventh Circuit, if not to Cowan, that the Illinois Appellate Court reached the merits of the issues raised in the postconviction petition for habeas corpus purposes when it affirmed the trial court's judgment rather than when it granted the Public Defender's *Finley* motion. Thus, even if, arguendo, Cowan's contention is absolutely correct and a review of the record for the purposes of determining a *Finley* motion is not a full merits review of the record, his contention does absolutely nothing to show that the Seventh Circuit is in error because that Court did not base its determination of this issue on what happened in the context of the *Finley* motion. It based its determination on what happened after the *Finley* motion had been decided.

The propriety of the Seventh Circuit's holding that the appellate court had reached the merits of Wilkinson's claims is further supported by state law. In Illinois, when an appellant fails to file a brief, the appellate court has the

discretion to dismiss the appeal or to consider the case on its merits. *Webb v. Swick*, 24 Ill. App. 3d 780, 321 N.E.2d 375 (1st Dist. 1974); *People v. Zakarian*, 121 Ill. App. 3d 968, 460 N.E.2d 422 (1st Dist. 1984). Here, the Illinois Appellate Court did not dismiss Wilkinson's appeal for failure to file a brief or for any other reason but, instead, affirmed the judgment of the trial court. Even when litigants fail to file briefs, the Illinois appellate courts "prefer to decide cases on their merits, and seek to avoid determinations based on procedural or rule violations or omissions." *Brantley v. Delnor Hospital, Inc.*, 120 Ill. App. 2d 185, 256 N.E.2d 369, 373 (2d Dist. 1970); *Application of County Collector*, 3 Ill. App. 3d 245, 278 N.E.2d 843 (1st Dist. 1971). The reason for the preference is that "the ends of justice are better served if litigation is determined according to the substantive rights of the parties and not by procedural default." *Lynch v. Wolverine Insurance Company*, 126 Ill. App. 2d 192, 261 N.E.2d 466, 466 (1st Dist. 1970); *Illinois Structural Steel Corporation v. Pathman Construction Company*, 23 Ill. App. 3d 1, 318 N.E.2d 232 (1st Dist. 1974). When one of the litigants has failed to file a brief, the appellate court's review of the trial court record is a necessary pre-condition to deciding the appeal upon its merits. *Hull v. City of Griggsville*, 29 Ill. App. 3d 253, 330 N.E.2d 293 (4th Dist. 1975). An examination of the record, then, is for the purposes of determining the merits of the appeal. *Russell v. License Appeal Commission of the City of Chicago*, 133 Ill. App. 3d 594, 273 N.E.2d 650 (1st Dist. 1971). And that is what the appellate court did here; it examined the record and then it determined Wilkinson's appeal on the merits.

Additional indication, if any is needed, that the Illinois Appellate Court's review of the record was for the purpose of determining the merits of the appeal is the court's failure to comply with the dictates of this Court in *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546 (1991) and *Harris v. Reed*, 489 U.S. 255, 109 S. Ct. 1038 (1989). In *Coleman*, this

Court noted that a federal court generally may not review a state court's denial of a defendant's federal constitutional claim if the state court's decision rested upon a state procedural default that was independent of the federal constitutional question and was adequate to support the defendant's continued custody. For example, the failure to timely file a state notice of appeal would serve as an independent and adequate ground sufficient to bar federal habeas review. To resolve any difficulty that might arise in the application of the "independent and adequate state ground" rule, the Court in *Coleman* created a conclusive presumption that the state may not rely upon a procedural default in a federal habeas action unless the state court clearly and expressly relied on such a ground in its decision.

This Court had previously declared in *Harris*, *supra*, cited in *Coleman*, *supra*, that a state court's reliance upon an independent and adequate state ground must be clear from the face of the state court's opinion itself. In *Harris*, the state appellate court had opined that the defendant, who was appealing the denial of his postconviction petition, had waived all but one of his postconviction issues by not presenting them on direct appeal. Nonetheless, the appellate court then went on to consider and reject all of Harris's claims on their merits. Reviewing the denial of Harris's federal habeas corpus petition, the Court of Appeals for the Seventh Circuit held that Harris's claims were procedurally barred. This Court reversed, noting that "a state court that wishes to rely on a procedural bar in a one-line pro forma order easily can write that 'relief is denied for reasons of procedural default.' " *Harris* 489 U.S. at 266, 109 S. Ct. at 1045. If a state court chooses not to so state, the Court added, then there is no basis for a federal habeas court to refuse to consider the merits of the federal claim.

It is clear, then, that the Seventh Circuit was correct when it found that the Illinois Appellate Court had reached the merits of the issues that Wilkinson had raised. The state court never

mentioned the failure to submit a brief as the basis for its decision. It said that it had reviewed the record and it then affirmed the trial court's judgment. In other words, it held to the policy of Illinois courts of appeal to decide cases on their merits rather than on procedural rule violations or omissions.

D. COWAN CONTENDS THAT THE SEVENTH CIRCUIT FOUND THAT A *FINLEY* MOTION MAY PRESERVE, FOR HABEAS REVIEW, MORE ISSUES THAN AN APPELLATE BRIEF

Yet once more Cowan seeks to misdirect this Court's attention away from what the Illinois Appellate Court did to Wilkinson after it granted his attorney's *Finley* motion. In fact, the Seventh Circuit did not find that the *Finley* motion preserved all issues raised in the state trial court for procedural default purposes. That Court did find, however, that it was the state appellate court's review of the record and its affirmance of the trial court's judgment on the merits that preserved the claims raised by Wilkinson in his postconviction petition. *See Wilkinson*, *supra* at 351.

Cowan argues that the Seventh Circuit's opinion forces state appellate courts to perform full merits reviews of issues not briefed on appeal. (Cert. Pet. 17.) In fact, the Seventh Circuit's *Wilkinson* decision forces state appellate courts to do nothing. If anything, it merely encourages them to comply with the "notice and opportunity to be heard" provisions of the United States Constitution because if they do not other state agents may not be able to claim procedural defaults against federal habeas petitioners. After all, had the Illinois Appellate Court complied with the Constitution rather than violating it by failing to give Wilkinson notice and an opportunity to present his objections to the court's impending decision to affirm the judgment against him, the Seventh Circuit would not have had the occasion to write the opinion to which Cowan now objects.

E. COWAN CONTENDS THAT THE SEVENTH CIRCUIT OFFENDS THE DOCTRINE OF COMITY

The Seventh Circuit's opinion is offensive here, Cowan lastly contends, because state courts that "conduct the proper limited frivolity analysis of a constitutional claim in a *Finley* situation may lose their comity-based privilege to perform a full merits analysis of any issues which a defendant did not present to them, but which he or she later presents in a federal habeas petition." (Cert. Pet. 16-17.) There are initially two obvious responses to this contention. First and frequently stated supra, the "analysis of a constitutional claim" complained of here was not performed in "a *Finley* situation." The Illinois Appellate Court performed its "proper limited frivolity analysis" and decided to grant the Public Defender's *Finley* motion for leave to withdraw but then the court, pursuant to the policy of Illinois courts of review, *Brantley v. Delnor Hospital, Inc.*, 120 Ill. App. 2d 185, 256 N.E.2d 369 (2d Dist. 1970); *Lynch v. Wolverine Insurance Company*, 126 Ill. App. 2d 192, 261 N.E.2d 466 (1st Dist. 1970), went on to examine and review the record for the purpose of determining Wilkinson's appeal on its merits.

Second, Wilkinson did everything that the Illinois Appellate Court allowed him to do to present his constitutional claim to that court. Wilkinson's alleged failure to present was his failure to file a brief on the merits of his appeal with the appellate court. Only it was the appellate court that prevented him from filing a brief when, subsequent to determining the *Finley* motion but in the same order, it affirmed the judgment of the trial court without giving Wilkinson any notice that it might do so. Thus, the appellate court, which knew — or, at the very least, certainly should have known — that under Illinois law Wilkinson could not file a pro se merits brief while he was represented by counsel, precluded him from filing a brief at all by terminating his appeal as soon as it had rendered him pro se.

If, then, the only avenue by which the Illinois Appellate Court could consider the merits of Wilkinson's constitutional claims was by his submission of a merits brief — a premise that underlies Cowan's entire case here — the court itself blocked that thoroughfare. The Illinois Appellate Court could easily have given Wilkinson the opportunity to prepare and file a merits brief but it chose instead to violate the United States Constitution and Illinois law to deny him that opportunity. If comity may be defined as the principle by which the courts of one jurisdiction will give effect to the judicial decisions of another out of deference and respect, *Black's Law Dictionary*, rev. 4th ed. (St. Paul, Minn: West Publishing Co., 1968), then the Seventh Circuit did not tread at all upon any state's "comity-based privileges" when it refused to find a procedural default in a situation where a state appellate court did virtually everything that it could to deny an appellant the opportunity to argue his appeal through the vehicle of a merits brief and, additionally, to deny itself the opportunity to determine his appeal upon a full briefing of the issues in that appeal. *See Arrowood v. Clusen*, 732 F.2d 1364 (7th Cir. 1984); *Parker v. Parratt*, 662 F.2d 479 (8th Cir. 1981), *cert. denied*, 459 U.S. 846, 103 S. Ct. 102 (1982).

F. THE DECISION OF THE SEVENTH CIRCUIT MAY BE SUPPORTED ON ALTERNATIVE GROUNDS

Assuming arguendo that the Seventh Circuit's opinion is in error for all of the reasons that Cowan advances in his petition for certiorari, the decision itself is still correct on the alternative ground that the Illinois Appellate Court, as discussed, *supra*, violated Wilkinson's right not to be deprived of life or liberty without due process of law.

CONCLUSION

Cowan prays this Court to grant his petition for a writ of certiorari because, he says, the Seventh Circuit's opinion has far-reaching implications and sets a dangerous precedent in an important area of federal habeas corpus law. (Cert. Pet. 17.) Perhaps that forewarning of unspecified horribles to come might be more compelling had Cowan correctly represented the issues he presents to this Court. Because Cowan has not accurately represented the instant case, the authorities he cites are not in conflict with the Seventh Circuit's decision here. In fact, neither Wilkinson's case nor the Seventh Circuit's opinion as they actually exist will have far-reaching implications or be a dangerous precedent.

First, the opinion here is too fact-bound to have the impact that Cowan predicts. The Seventh Circuit said as much: "In view of the *particular way* in which the Illinois appellate court disposed of Wilkinson's post-conviction appeal, however, we do not believe that he procedurally defaulted the ineffectiveness claim." *Wilkinson*, *supra*, at 350; emphasis added. Moreover, the procedure that the appellate court followed in Wilkinson does not appear to be the typical procedure of Illinois courts of review. In *People v. Lee*, 251 Ill. App. 3d 63, 621 N.E.2d 287, 288 (1993), for example and as noted by the Seventh Circuit, the appellate court stated that

> "[c]ounsel requested that this court grant petitioner a reasonable opportunity to show cause why the appeal should not be dismissed or the judgment affirmed for lack of merit and why the office of the State Appellate Defender should not be allowed to withdraw as counsel on appeal. The clerk of this court advised petitioner that he had 30 days in which to respond to the motion and in which he could file any additional matters of merit."

Wilkinson, *supra* at 351. In *Lee*, then, the appellant was notified that more was pending before the state appellate court than

appointed counsel's prayer to withdraw and he was further notified that he had an obligation to respond concerning the merits of the case. Pretty much the only similarity between *Lee* and *Wilkinson* is that the pertinent state court rulings were both made by panels of the Illinois Appellate Court. Certainly, Cowan has failed to cite any case to show that the state appellate procedure that the Illinois Appellate Court applied to Wilkinson is common — or, indeed, that it has been applied to any other appellant at all.

Second, the opinion of the Seventh Circuit is far too narrowly drawn and confined by the particular facts of this case to be dangerous. The Seventh Circuit's opinion holds only that a representative of a state may not claim a procedural default in a federal habeas corpus proceeding when the state appellate court affirmed a judgment against a defendant without giving notice to that defendant that the court might do so and without giving the defendant an opportunity to be heard in regard to the possible affirmance. The Seventh Circuit would, in all likelihood, have set a much more dangerous precedent had it accepted Cowan's contention about the procedure to be followed in this case. In that event, a state appellate court could effectively prevent any appellant whose counsel filed a *Finley* motion from ever being granted federal habeas corpus relief by the simple expedient of granting the *Finley* motion and affirming the judgment against the appellant without ever allowing that appellant to go beyond the statement of withdrawing counsel that there are no arguable issues in the appeal. It could very logically be argued, then, that the Seventh Circuit by its *Wilkinson* opinion may have prevented the "*Wilkinson* procedure" from becoming a more common procedure in state appellate proceedings.

For the foregoing reasons, the Respondent herein, Mark Wilkinson, prays that Roger D. Cowan's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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